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5                   UNITED STATES DISTRICT COURT  
6                   EASTERN DISTRICT OF WASHINGTON

7                   LILLIAN FIGUEROA, an individual,

8                   Plaintiff,

9                   v.

10                  BNSF RAILWAY COMPANY, a  
11                  foreign corporation

12                  Defendant.

NO. 4:17-CV-5096-TOR

ORDER DENYING DEFENDANT'S  
MOTION TO DISMISS

13                  BEFORE THE COURT is Defendant's Motion to Dismiss (ECF No. 6).

14 This matter was submitted for consideration with oral argument on September 27,  
15 2017. The Court has reviewed the record and files herein, and is fully informed.

16 For the reasons discussed below, Defendants' Motion to Dismiss (ECF No. 6) is

17 **DENIED.**

18                   **BACKGROUND**

19                  This case concerns a claim under the Federal Employers' Liability Act, 45  
20 U.S.C. § 51, by Plaintiff Lillian Figueroa against Defendant BNSF Railway

1 Company, a foreign corporation incorporated in Delaware. ECF No. 1 at ¶¶ 1–2.  
2 On August 7, 2017, Defendant filed this Motion to Dismiss under 12(b)(6), arguing  
3 that Plaintiff's claim is time barred by the applicable three-year statute of  
4 limitations (45 U.S.C. § 56) and that equitable tolling is not appropriate due to  
5 Plaintiff's alleged forum shopping. ECF No. 6 at 1–2. For the reasons discussed  
6 below, the Court denies Defendant's motion.

7 **FACTS<sup>1</sup>**

8 On May 29, 2012, Plaintiff was injured while performing work at  
9 Defendant's Pasco Diesel Facility in Washington. ECF Nos. 1 at ¶ 3; 6 at 3. On  
10 May 22, 2015, Plaintiff filed suit in the Circuit Court of the State of Oregon. ECF  
11 Nos. 1 at ¶ 9; 8-2 at 2. Defendant filed a motion to dismiss for lack of personal  
12 jurisdiction, which was denied. ECF Nos. 1 at ¶ 14; 8-4 at 2; 8-6 at 2. On  
13 February 26, 2016, Defendant filed a Writ of Mandamus with the Oregon Supreme  
14 Court. The Court allowed the petition and heard oral argument on November 10,  
15 2016. ECF No. 1 at ¶¶ 16–17. On March 23, 2017, the Oregon Supreme Court  
16 issued a Peremptory Writ of Mandamus and Appellate Judgment, instructing the

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<sup>1</sup> Defendant asserts that its Motion to Dismiss tests the sufficiency of  
19 Plaintiff's allegations, and so it states facts alleged by Plaintiff without admitting  
20 those facts. ECF No. 6 at 3.

1 Circuit Court judge to vacate his prior order denying the motion to dismiss and  
2 conduct further proceedings consistent with the decision of the Oregon Supreme  
3 Court. *Id.* at ¶ 19. On July 7, 2017, the Circuit Court judge signed an Order and a  
4 Judgment document involuntarily dismissing the matter for lack of personal  
5 jurisdiction, which was entered on July 11, 2017. *Id.* at ¶¶ 23–24. On July 12,  
6 2017, Plaintiff filed a Complaint in this Court. *Id.* at ¶ 26. Defendant then filed  
7 this Motion to Dismiss on September 27, 2017. ECF No. 6.

8 **DISCUSSION**

9 Fed. R. of Civ. P. 12(b)(6) provides that a defendant may move to dismiss  
10 the complaint for “failure to state a claim upon which relief can be granted.” Fed.  
11 R. of Civ. P. 12(b)(6). To survive dismissal, a plaintiff must allege “sufficient  
12 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its  
13 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*  
14 *Twombly*, 550 U.S. 544, 570 (2007)). This requires the plaintiff to provide “more  
15 than labels and conclusions, and a formulaic recitation of the elements.” *Twombly*,  
16 550 U.S. at 555. When deciding, the Court may consider the plaintiff’s allegations  
17 and any “materials incorporated into the complaint by reference.” *Metzler Inv.*  
18 *GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008) (citing  
19 *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). A  
20 plaintiff’s “allegations of material fact are taken as true and construed in the light

1 most favorable to the plaintiff[,]” but “conclusory allegations of law and  
2 unwarranted inferences are insufficient to defeat a motion to dismiss for failure to  
3 state a claim.” *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1403 (9th Cir. 1996)  
4 (citation and brackets omitted).

5 In addition, a motion to dismiss based on the running of the statute of  
6 limitations may be granted only “if the assertions of the complaint, read with the  
7 required liberality, would not permit the plaintiff to prove that the statute was  
8 tolled.” *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 (9th Cir.  
9 1995) (quoting *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980)).  
10 The Ninth Circuit has determined that a complaint cannot be dismissed “unless it  
11 appears beyond doubt that the plaintiff can prove no set of facts that would  
12 establish the timeliness of the claim.” *Id.* at 1207 (citation omitted).

13 Here, Defendant alleges Plaintiff’s claim is time barred by the three-year  
14 statute of limitations under 45 U.S.C. § 56. ECF No. 6 at 1. Plaintiff asserts that  
15 the statute of limitations was tolled during the state court proceeding. ECF No. 1  
16 at ¶ 7. This Court determines that Plaintiff could prove a set of facts to establish  
17 that equitable tolling applies. *See Supermail*, 68 F.3d at 1206.

18 Reading the allegations in the complaint with the required liberality, the  
19 Court cannot say that Plaintiff will be unable to establish that the matter was tolled  
20 during the state court proceedings. The equitable tolling doctrine “enables courts

1 to meet new situations [that] demand equitable intervention, and to accord all the  
2 relief necessary to correct... particular injustices.” *Holland v. Florida*, 560 U.S.  
3 631, 650 (2010) (quotations and citation omitted). “Generally, a litigant seeking  
4 equitable tolling bears the burden of establishing two elements: (1) that he has  
5 been pursuing his rights diligently, and (2) that some extraordinary circumstances  
6 stood in his way.” *Credit Suisse Sec. (USA) LLC v. Simmonds*, 556 U.S. 221, 227  
7 (2012) (quotation and citation omitted). The first element requires the litigant to  
8 show she undertook “the effort that a reasonable person might be expected to  
9 deliver under his or her particular circumstances.” *Doe v. Busby*, 661 F.3d 1001,  
10 1015 (9th Cir. 2011). This diligence does not require “an overzealous or extreme  
11 pursuit of any and every avenue of relief.” *Id.* The second element requires the  
12 litigant to show that “extraordinary circumstances were the cause of his  
13 untimeliness ... and ... ma[de] it impossible to file [the document] on time.”  
14 *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009) (quotations and citations  
15 omitted).

16 Equitable tolling is appropriate when “plaintiff has not slept on his rights  
17 but, rather, has been prevented from asserting them.” *Burnett v. New York Cent. R.*  
18 *Co.*, 380 U.S. 424, 429 (1985). Courts have “recognized the unfairness of barring  
19 a plaintiff’s action solely because a prior timely action is dismissed for improper  
20 venue after the applicable statute of limitations has run.” *Id.* at 430. When a

1 plaintiff files a timely FELA action in state court, serves the defendant with  
2 process, and the case is then dismissed for improper venue, “the FELA limitation is  
3 tolled during the pendency of the state suit.” *Id.* at 434–35.

4 Here, in light of the equitable tolling doctrine, the Court cannot say that  
5 Plaintiff was not acting diligently in the pursuit of her claim. Before the three year  
6 statute of limitations, Plaintiff filed in state court and upon the dismissal of the  
7 state court claim, she immediately filed in federal court. Defendant argues that  
8 Plaintiff was not prevented from filing her action in this court, but Plaintiff is not  
9 required to pursue every avenue of relief to be considered diligent. ECF No. 6 at  
10 6; *see Doe*, 661 F.3d at 1015. Secondly, her untimeliness was due to the state  
11 court proceeding, which *Burnett* recognizes as a tolled time period. *See Burnett*,  
12 380 U.S. at 434–35. It is possible that a set of facts could be proven to show that  
13 Plaintiff was not sleeping on her rights, but was actively pursuing her claim in state  
14 court.

15 Defendant asserts that Plaintiff was merely seeking a jurisdiction with  
16 preferable discovery rules and this forum shopping makes equitable tolling  
17 inappropriate. ECF No. 6 at 6. Defendant cites *Daimler AG v. Bauman* to show  
18 that Plaintiff knew the Oregon state court did not have jurisdiction, reflecting a  
19 strategic decision and not a circumstance outside her control. ECF No. 6 at 6–7;  
20 *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014). Yet, it is not clear that *Daimler*

1 concluded the issue of personal jurisdiction over a foreign corporation. *Id.* The  
2 Court further clarified the precise issue of personal jurisdiction by state courts  
3 under FELA in *BNSF Ry. Co. v. Tyrrell*, where the Supreme Court held that  
4 “FELA does not authorize state courts to exercise personal jurisdiction over a  
5 railroad solely on the ground that the railroad does some business in their States.”  
6 *BNSF Ry. Co. v. Tyrrell*, 137 S.Ct. 1549, 1558 (2017). This case occurred two  
7 years after Plaintiff filed her case in state court. Thus, Plaintiff may well be able to  
8 prove that equitable tolling is appropriate given that the law may not have been  
9 clear when she filed her case in 2015.

10 This Court finds that Plaintiff could prove a set of facts establishing that the  
11 action was timely and the Court therefore denies Defendant’s Motion to Dismiss.

12 **ACCORDINGLY, IT IS HEREBY ORDERED:**

13 Defendant’s Motion to Dismiss (ECF No. 6) is **DENIED**.

14 The District Court Executive is directed to enter this Order and furnish  
15 copies to counsel.

16 **DATED** September 27, 2017.



17 A handwritten signature in blue ink that reads "Thomas O. Rice".  
18 THOMAS O. RICE  
19 Chief United States District Judge  
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